BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
MOBILEMEDIA CORPORATION, et al.	)	WT Docket No. 97-115
	)	
Applicant for Authorizations and Licensee of Certain Stations in Various Services	)	

To: The Commission

REPLY IN SUPPORT OF THE PETITION OF JOHN M. KEALEY FOR RECONSIDERATION AND MODIFICATION OR CLARIFICATION OF THE COMMISSION ORDER OF AUGUST 8, 1997

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September 29, 1997

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John M. Kealey ("Kealey"), by his attorneys, hereby submits this Reply in further support of his petition to the Federal Communications Commission ("FCC" or "Commission"), pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106, to reconsider its Order, FCC 97-284, released August 8, 1997, in WT Docket No. 97-115 ("August 8 Order"), and either (1) modify the August 8 Order by removing Kealey from the list of individuals whose qualifications to hold an FCC license are in question, or (2) clarify the August 8 Order by defining a procedure by which Kealey may immediately proffer information relevant to his qualifications, for example, by granting a limited waiver of paragraph 8 and an expedited qualifications hearing pursuant to 47 C.F.R. §§ 1.3 and 1.41.

Kealey did not intend, by his petition, to drag back into the fray the 39 individuals the Commission released from the "potential wrongdoers" list; to interfere with the efforts of MobileMedia Corporation ("MobileMedia" or the "Company") to effect a successful transfer of control under Second Thursday; or, to otherwise challenge the stay that is in place as a result of the FCC's earlier order. Kealey simply wants the Commission to redress the inequity of its August 8

Order, which, based on an admittedly uncertain and undemonstrative record, treats Kealey unfairly by including him on a short list with the only two who by their own admission engaged in a long course of wrongdoing, and which effectively denies Kealey any meaningful opportunity to challenge an unfavorable public categorization that has cost him employment in the telecommunications industry.[1]

I. THE FACTUAL RECORD DOES NOT JUSTIFY THE COMMISSION'S DISPARATE TREATMENT OF KEALEY BASED ON SIMILARLY AND EQUALLY UNCERTAIN EVIDENCE.

Inexplicably, over the course of the papers filed and orders entered since the Commission designated the matter for administrative hearing, the factual record -- once perceived by the Commission as underdeveloped and not "entirely forthright" -- has been transformed without any further development or addition into a record characterized by the Company and the Bureau as

[1] In its Consolidated Comments on Requests for Clarification ("Consolidated Comments" or "CC"), the Wireless Telecommunications Bureau (the "Bureau") "notes that Mr. Kealey's argument is actually a challenge of the Stay Order, not the Reconsideration Order because Mr. Kealey was included in the 'potential wrongdoer' list in the Stay Order." (CC, ¶ 11). Kealey's Petition cannot credibly be interpreted in this way. First, the Stay Order's "potential wrongdoer" list is materially different from the whittled down list of four that resulted from the August 8 Order. Second, the Stay Order did not (1) reference Kealey by name; (2) interpret the contents of the initial internal investigation report which the Company voluntarily disclosed to the Bureau on October 15, 1996 (the "Report"); (3) disclose specific allegations regarding Kealey; (4) differentiate Kealey from others listed as "potential wrongdoers" based on a record previously deemed "unclear" and not "entirely forthcoming;" or (5) group Kealey with the only two individuals who have admitted wrongdoing. Third, Kealey has not been named as party to this proceeding, and it was not until the August 8 Order that his name and reputation were thrown into the limelight with devastating effects on his employability. Fourth, the Bureau's own comments illuminate the fact that the problems Kealey addresses in his Petition emanate from the August 8 Order, and not the June 6 Order. Finally, Kealey's Petition includes a request for limited waiver and expedited qualifications hearing pursuant to 47 C.F.R. § 1.3 and 1.41. In sum, it seems strange that the Bureau would so cavalierly choose to urge the Commission to dismiss Kealey's Petition on a wholly inapplicable procedural technicality.

"sufficient" and "ample" to support the Commission's decision to condemn four former MobileMedia officers while releasing 39 current ones. (Comments of MobileMedia Corporation on Petition of John M. Kealey ("Comments"), p. 2; CC, p. 6). This characterization is not surprising given the Company's interest in preserving its greatly improved chances of successfully proceeding under Second Thursday and the Bureau's interest in avoiding the real fact-finding that the current record, and likely its own investigation, lack.

The reality is that the record "developed" thus far by the Company and the Bureau consists only of (1) the Report, and (2) an investigation the Bureau conducted between October 1996 and April 1997, the substance of which has remained largely undisclosed except for its finding that "a substantial and material question of fact [exists] concerning whether MobileMedia was entirely forthcoming in its [Report]." (Hearing Designation Order, ¶ 10). The August 8 Order, and the Bureau's support for that Order, derive almost exclusively from the Report. The Report, however, does not attribute knowledge or acquiescence to Kealey in the way the Company and the Bureau now suggest, nor can it be fairly called the vehicle by which the Commission can make even preliminary qualifications judgments of such serious magnitude.

For example, it is hard to imagine how the allegations of Regulatory Counsel, an admitted wrongdoer, could raise "a substantial and material question" concerning Kealey's qualifications to be an FCC licensee. The Report clearly identifies Regulatory Counsel as the "center of the problem." It reveals "no evidence suggesting that inaccurate filings made prior to 1996 were known to members of the Company's management outside of the Regulatory Counsel's Office." The Report does not support the Bureau's assertion that "[a]ccording to MobileMedia's report, MobileMedia's Regulatory Counsel and General Counsel claim that Kealey knew of and approved the inaccurate

filings" (CC, ¶ 10). Rather, the Report actually explains that Regulatory Counsel (1) "had central responsibility for the company's overall compliance with the licensing requirements of the FCC"; (2) "prepared, certified, and filed an unprecedently large number" of false Forms 489; (3) claimed he discussed and received approval from Kealey for his decision to file forms with the FCC "at least informally" in January 1996; (4) could "not recall the precise details and timing of this conversation"; and (5) characterized the matter to Kealey as "an issue of timing and minimized the significance of any FCC rules violation." Moreover, with respect to General Counsel, the Report states that he "corroborates [Regulatory Counsel's] recollection in all material respects" but "claims he neither gave nor was asked to give a recommendation on the matter to Kealey." Of course, the Bureau never once acknowledges in its Consolidated Comments that Kealey denied, both to the Company's outside counsel and to the Bureau itself when Kealey participated in an informal interview at the Bureau's office in May 1997, having ever been informed of the false filings by Regulatory Counsel. It is absurd to reason that an accomplished executive like Kealey, who had no direct oversight of the Regulatory Counsel's Office, would learn of and address, let alone ratify, in a passing conversation illegal activity that had begun occurring at least two and a half years earlier. These suspect claims of an admitted wrongdoer cannot constitute "ample grounds" for the Commission to so narrowly target Kealey as a "potential wrongdoer."

In addition, the Bureau argues that certain events and documents sufficiently evidence Kealey's awareness of the false filings to warrant his inclusion on a short list. (CC, ¶ 10). Indeed, attached as exhibits to the Company's Report are various documents containing allegedly meaningful yet cryptic language which were either carbon-copied to Kealey or sent to him as part of a distribution. The Bureau fails to mention, however, that the documents in question were also

circulated, distributed, or carbon-copied to many of the other 39 who were released from the "potential wrongdoer" list by the August 8 Order. In the same vein, the Report describes various senior staff or Network Operations Group meetings at which a certain awareness of the false filings allegedly emerged. Kealey did not attend those meetings alone; many of the other 39 people removed from the list were also present. Nonetheless, the Bureau would have the Commission believe on these grounds that Kealey "is in a fundamentally different position than the other individuals who were removed from the list under the [August 8 Order]." (CC, ¶ 10).

That Kealey's inclusion is inconsistent with the removal of the other individuals from the list is only further illuminated by the Bureau's argument that "others interviewed generally believed that Kealey was aware of the inaccurate filings." (CC, ¶ 10). The Commission released other officers of the Company in the presence of equally ambiguous evidence that they "may have had some degree of knowledge of the wrongdoing." (August 8 Order, ¶ 9). As to Kealey, however, the Bureau argues that the same quality of evidence is "sufficient" to raise a substantial and material question about his qualifications. The Bureau's position simply evinces its premature determination of Kealey's qualifications and exacerbates the due process injury that occurred by the August 8 Order.

For self-serving reasons, the Company and the Bureau have mischaracterized the factual record to mask the obvious inequity in the Commission's decision to target Kealey and free others. The Commission should correct that deficiency by removing Kealey from the list.

II. KEALEY'S INTEREST IN FUTURE EMPLOYMENT IS CONSTITUTIONALLY PROTECTED, AND THE AUGUST 8 ORDER ERRONEOUSLY DEPRIVES HIM OF THAT INTEREST BY ITS FAILURE TO PROVIDE A MEANINGFUL OPPORTUNITY FOR KEALEY TO CLEAR HIS NAME.

The Bureau writes that "[t]he Commission, for its administrative processing purposes, has

noted Kealey as 'a potential wrongdoer' whose applications could not be granted without resolution of his character qualifications." (CC, ¶ 14). This is a blatant misstatement. The Commission has done far more than make an administrative processing notation or "defer action on [Kealey's] applications." (CC, ¶ 12). It has publicized to the entire telecommunications industry that Kealey has been classified on a par with two admitted wrongdoers, thereby pronouncing that his character is equally suspect. This classification, according to the Bureau, does not constitute "significant, grievous injury" to a constitutionally protected interest. The Bureau is dead wrong.

The Supreme Court has held that "'[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'" Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Specifically, the Court noted that "[t]he purpose of such notice and hearing is to provide the person an opportunity to clear his name." Id. at 573 and n. 12. Although publication of stigmatizing charges alone does not invoke the due process clause, when coupled with damages to "*tangible interests such as employment,*" the protections of due process are in fact triggered. Paul v. Davis, 424 U.S. 693, 701 (1976) (emphasis added). Indeed, "[f]reedom to pursue gainful employment is clearly a liberty interest deserving of due process protections." Dean v. McWherter, 70 F.3d 43, 45 (6th Cir. 1995) (citing Roth, 408 U.S. at 573-74). A person may have a liberty interest in "being free from arbitrary restrictions upon the opportunity for [future] gainful employment." Boston v. Webb, 783 F.2d 1163, 1167 (4th Cir. 1986). That is particularly true where allegations of serious character defects such as dishonesty or immorality foreclose future employment opportunities. See Robertson v. Rogers, 679 F.2d 1090, 1092 (4th Cir. 1982). The ability to "clear [one's] name against unfounded charges" will theoretically restore one's interest in

future employment. Boston, 783 F.2d at 1167.

Kealey essentially has been disqualified as a licensee. By its August 8 Order, the FCC has published stigmatizing statements made in connection with that disqualification. Kealey has repeatedly asserted that those statements are untrue. The statements made about him allege serious character defects. They have damaged his professional reputation in such a manner as to seriously hamper his future employment prospects in the telecommunications industry. To assume otherwise is unreasonable, unfair, and unrealistic. Kealey, therefore, has a liberty interest entitled to due process protection. See District Council 20 v. District of Columbia, 1997 W.L. 446254, *7 (D.D.C. 1997).

Even the Company implicitly agrees that the August 8 Order erroneously deprives Kealey of that interest by virtue of the inadequacy of the mechanisms it provides him to clear his name. (Comments, pp. 1-2). The Bureau, on the other hand, concludes that the Commission should not set "yet another Commission procedure by which Kealey can demonstrate that he is qualified to be a Commission licensee" because the August 8 Order provides that Kealey can do so in the context of the Company's Second Thursday proceeding or a license application in which he has an attributable interest. (CC, ¶¶ 12, 15). These mechanisms are nothing more than theoretical opportunities. In reality, they are not "meaningful" under procedural due process analysis. See Kremer v. Chemical Construction Corp., 456 U.S. 461, 489 (1982); Gilbert v. Homar, 65 U.S.L.W. 4442, 4444 (U.S. 1997).

The Bureau curiously overlooks the fact that the opportunity for Kealey to resolve his qualifications in the context of this proceeding could not be available until April 1998 and may never be available should the Commission grant MobileMedia Second Thursday relief. In addition, despite

Kealey's early disclosure that he is not an FCC licensee or applicant and does not hold an attributable interest in any licensee or applicant, the Bureau finds promising the prospect of resolving Kealey's publicly-questioned character in the context of a license application. The Bureau's position defies logic by trapping Kealey in a "catch-22": Kealey will never be able to acquire an attributable interest in any telecommunications company in the shadow of the August 8 Order.

Unless the Commission clarifies its August 8 Order to provide additional procedural safeguards, Kealey has virtually no control over his future. To realize either of the "opportunities" that exist for him to clear his name, Kealey is at the mercy of the Company, prospective employers, or those who wish to invest in an FCC licensee. Without significant fiscal or administrative burden, the Commission can redress this inequity by, for example, waiving paragraph 8 of the August 8 Order and, on an expedited basis, designating a hearing to allow Kealey to show directly to the Commission that he is fully qualified to hold FCC licenses. Accordingly, Kealey respectfully submits that the Commission should reconsider and clarify its August 8 Order to provide a mechanism by which Kealey's qualifications may be determined, regardless of MobileMedia's stay or the outcome of Second Thursday relief, and without the prerequisite of application or attributable interest.

III. CONCLUSION

For the further reasons set forth above as well as those in his initial petition, Kealey requests that the Commission reconsider the August 8 Order and either (1) modify the August 8 Order to remove Kealey from the list of those persons whose qualifications remain in question, or (2) clarify the August 8 Order to define a procedure by which Kealey may immediately proffer information relevant to his qualifications to hold FCC licenses.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 1997, a true and correct copy of the foregoing Reply in Support of the Petition of John M. Kealey for Reconsideration and Modification or Clarification of the Commission Order of August 8, 1997 was served via U.S. Mail, postage prepaid on the following persons:

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